of the donor, he cannot thereafter acquire other exempt property and claim the benefit of the exemption as to both the property disposed of and that newly acquired. Nor, as it clearly seems, if the sale or gift is merely colorable, and the relation of the owner to it or his circumstances subsequently so change that he would no longer be entitled to claim it as exempt, if there had been no disposition of it, will he or those claiming under him be entitled to claim the benefit of the exemption. The true test seems to be that stated in the principal case. Was the sale or gift valid when made? If the ownership and title then passed absolutely from the debtor so that he could not afterward have or claim any benefit from it, no fraud has been committed and the transfer is unimpeachable on the part of creditors.

MARSHALL D. EWELL.

Supreme Court of Illinois.

UNITED STATES MORTGAGE CO. *v.* J. GROSS ET AL.

Foreign corporations were not authorized, in Illinois, prior to the Act of April 9th 1875, to loan money within that state, and securities for money so loaned were void, but that act not only enables them to loan money there, but also validates their previous loans, and is constitutional.

The comity between states does not require that a state should allow a foreign corporation to exercise powers denied to its own corporations.

THIS was a cross-bill filed by Gross, as a second mortgagee, to declare null and void the first mortgage, held by the U. S. Mortgage Co., on the ground that it was a foreign corporation, and for other relief.

BAKER, J.—We will first examine as to the validity of the mortgage executed by Lombard to the United States Mortgage Co.

The charter of that company is not incorporated in the record, but from its name, the character of its transaction here involved, and the facts appearing in the case, we may reasonably conclude its principal or sole business was, and is, to loan money, taking to itself mortgages on real estate to secure the same.

The general incorporation law of 1872, which was in force when the mortgage was executed, provided for the formation, in the state, of companies for any lawful purpose, expressly excepting, however, corporations for banking, insurance, real estate brokerage, operation of railroads, and the business of loaning money. Section 26 of the act provided that "foreign corporations, and the officers and agents thereof, doing business in this state, shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers.

"And no foreign or domestic corporation, established or maintained in any way for the pecuniary profit of its stockholders or members, shall purchase or hold real estate in this state, except as provided for in this act."

From these statutory enactments we deduce these conclusions: The latter sentence of section 26 was aimed at the purchasing and holding of real estate by corporations, for the reason such acts would tend to create perpetuities; and by this and other provisions of the same act, the evil feared was effectually guarded against. We think, however, it was not designed thereby to prevent corporations from taking mortgages on real estate as security for debts. In fact, the act contemplates corporations will acquire real estate in satisfaction of indebtedness due them, and makes such provision in the fifth section for the sale of real estate so taken, as secures the state against the evil had in legislative view, and which had been discussed by this court in *Carroll* v. *The City of East St. Louis*, 67 Ill. 568. Indeed, it is difficult to see how mortgages, which are conveyances, subject to conditions of defeasance, can be considered as tending to create perpetuities. Payments made of the debts thus secured, defeat the titles of the mortgagees, and even if they take possession, the incomes gradually undermine and destroy their titles. If the premises are sold under powers, the mortgagees cannot themselves become purchasers; and if the mortgages are foreclosed by suit, the decrees of the court thereafter become the basis of title.

But we see from the first sentence of this section 26, it was the policy of the state that foreign corporations should have no other or greater powers in the state than corporations of like character, organized under the general laws of the state; and further see from the first section of the act, it was a part of that same policy that corporations shall not be formed in the state for the business of loaning money. It follows, that corporations organized in a foreign state, for such business of loaning money, could not claim to pursue such business in this state. The comity between the states does not demand we should hold that this mortgage company, incorporated under an act of the state of New York, could lawfully within this state exercise powers denied to corporations within our own borders. All the acts of this company here done in furtherance of such business of loaning money were invalid, as being obnoxious to our policy and institutions.

The Act of April 9th 1875, provides, among other things, that any corporation formed under the laws of any other state or country, and authorized by its charter to invest or loan money, may invest or loan money in this state. And any such corporation that may have invested or lent money, as aforesaid, may have the same rights and powers for the recovery thereof, subject to the same penalties for usury, as private persons, citizens of this state; and when a sale is made under any judgment, decree, or power in a mortgage or deed, such corporation may purchase in its corporate name, the property offered for sale, and become vested with the title wherever a natural person might so do in like cases: L. 1875, p. 65.

It was the evident intention of this latter act, not only to change somewhat the policy of the state, but to validate such contracts as that here under consideration. It is urged by appellant, that even if the mortgage was theretofore invalid, it was rendered valid and binding by this act; and by appellee it is contended the act thus construed, would deprive him of his property without due process of law, and take from him a vested right.

A statute must have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively. Here there is no doubt that the statute is retroactive; it is expressly so on its face. Unless there be a constitutional inhibition, a legislature has power, when it interferes with no vested right, to enact retrospective statutes to validate invalid contracts, or to ratify and confirm any act it might lawfully have authorized in the first instance. We do not deem it necessary to cite any of the many cases where this doctrine has been announced or followed.

In Cooley's Constitutional Limitations, p. 374, it is said: "When such acts go no further than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, the question they suggest is one of policy and not one of constitutional power."

Lombard borrowed the money and attempted to make a valid contract of mortgage to secure its payment, and he was, if not legally, at least in justice and good conscience, bound thereby; and it is clear the mortgage might well be validated so far as regards him. But it is claimed, the rights of third persons have intervened which cannot be affected by this legislation. The true line of dis-

tinction is laid down by Cooley in his work on Constitutional Limitations, just quoted from. On pages 378 and 379, he says: "The operation of these cases, however, must be carefully restricted to the parties to the original contract, and to such other persons as may have succeeded to their rights with no greater equities. A subsequent *bona fide* purchaser cannot be deprived of the property which he has acquired, by an act which retrospectively deprives his grantor of the title which he had when the purchase was made. Conceding that the invalid deed may be made good as between the parties, yet if, while it remained invalid, and the grantor still retained the legal title to the land, a third person has purchased, and received a conveyance, with no notice of any fact which should preclude his acquiring an equitable as well as a legal title thereby, it would not be in the power of the legislature to so confirm the original deed as to divest him of the title he has acquired. The position of the case is altogether changed by this purchase. The legal title is no longer separated from equities, but in the hands of the second purchaser is united with an equity as strong as that which exists in favor of him who purchased first.

"Under such circumstances, even the courts of equity must recognise the right of the second purchaser as best, and as entitled to the usual protection which the law accords to vested interests."

We understand the rule to be that where a third party purchases under such state of facts as would preclude his acquiring an equitable as well as a legal title, the legislature may confirm the original contract so as to protect him. So here, the National Life Insurance Company had and has no equity as against the United States Mortgage Company, and bought expressly subject to its equity, and agreed as a part of the purchase-money for the premises, to pay the debt which was in equity and good morals due from Lombard to the Mortgage Company. It would be inequitable and unjust to permit the Insurance Company, were it here defending against this mortgage, it having agreed to pay $100,173 for these lots, the larger portion of which was in the assumption of the debt of Lombard to the Mortgage Company, and secured or attempted to be secured by the mortgage expressly subject to which it purchased, to now hold this valuable property, discharged of their debt. It received full consideration for this assumption of the mortgage debt, and to now keep and possess the property released therefrom, would be such want of good faith on its part, both towards Lombard, its grantor,

whose debt it was paid for assuming, and to appellant, as a court of equity would be loth to sanction.

We think it is evident the Insurance Company took the lots with no greater equities than existed in Lombard, the party to the original mortgage contract with appellant.

Great stress is laid by appellee upon the case of *Thompson* v. *Morgan*, 6 Minn. 295; and it is said that case is exactly like the one at bar. We do not think the cases are analogous. Even if we assume the doctrine of that case to be correct, a point it is not deemed necessary to here examine, yet there is a broad and fundamental distinction between the two cases. In that case the court held that the mortgage from Folsom to Morgan was ineffectual to pass an interest in the land, because not executed in conformity with statutory requirements, and that, although Folsom afterwards conveyed the premises to Babcock, subject to the Morgan mortgage, and so expressed in the deed, yet he could safely take the title subject to the mortgage, and rely upon the defence that was patent upon its face for protection, and that the curative act of July 26th 1858, could have no effect to validate the Morgan mortgage, to the prejudice of Babcock or of Thompson, who claimed under him.

But, it will be noted, the gist of the case is the mere notice to Babcock, and the question was, whether such notice changed his status as regarded the character and defects of the mortgage.

And the court said: "Babcock might, perhaps, have estopped himself from questioning the validity of this mortgage by an appropriate clause in his deed recognising it as a subsisting lien, and waiving its defects; but the mere admission of notice that such a mortgage existed, by a recital of it in this deed, through which he derived his title, would not operate such a consequence." We regard this as a plain intimation by the Supreme Court of Minnesota, that had this element of a recognition of the mortgage as a lien and waiver of defects appeared in the record, the decision of that case would have been otherwise.

In the case at bar, the premises were not only sold subject to the mortgage, but there was an express assumption of the mortgage debt, and a promise to pay that mortgage debt as a part of the consideration of the purchase. The facts of this case go far beyond a mere notice; and beyond even that which seems to have been deemed sufficient in *Thompson* v. *Morgan*. * * * * * *

Our conclusion is, it was entirely competent for the General

Assembly to validate the mortgage in question, not only as to the parties to the original contract, but as to Gross, the assignee of the equitable interest in the trust deed; since, under the circumstances of the case, he has no such equities as will give him a vested right as against the equities of the mortgage company. A party cannot have a vested right contrary to equity and justice.[1] * * * *

The policy of the legislation of Illinois, up to the time of the passage of the Act of April 9th 1875, above referred to, has always been steadily against allowing corporations, either domestic or foreign, to hold real estate within the state, either in fee or as security, except such as might be necessary for the conduct of their business, or such as they might take for debts previously incurred, in which latter case, however, they are compelled to sell it within a limited time.

This policy the Supreme Court of the state fully approved, and firmly enforced whenever a case came before them.

The leading case now is that of *Carroll* v. *City of East St. Louis*, 67 Ills. 568, which was an action of ejectment for the recovery of premises sold by a corporation organized in the state of Connecticut for the purchase and sale of real estate, and which had expended its whole capital stock in the purchase of land in Illinois, of which they went into possession. The Supreme Court held, in a carefully considered opinion, that as a corporation created in one state cannot exercise its functions in another without permission, and as there was no direct legislation upon the subject, recourse must be had to the public policy of the state as indicated by the general course of legislation, and as that had been directed against the creation of perpetuities in the tenure of property, the purchase by the Connecticut Land Company was repugnant to the general policy of the state, and the sale was void, and that the company having acquired no title to the real estate, could convey none.

On the question of the comity between states, the Supreme Court held, in *Ducat* v. *City of Chicago*, 48 Ill. 172, that it was a voluntary act of the sovereign power, and ceased to be binding whenever its exercise was deemed to be contrary to the policy of the state, or prejudicial to its interests, and that a discrimination could be rightfully made between foreign and domestic corporations of the same character, even to the extent of compelling the former to leave the state; and that the constitutional provision that "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states," did not apply to the case, a foreign corporation not being a "citizen" within the meaning of the constitution. This decision was affirmed by the Supreme Court of the United States in 10 Wall. 410.

In the case of *Metropolitan Bank* v. *Godfrey*, 23 Ill. 579, where the bank was organized under the general banking law of New York, it was held incompetent to take and convey lands in its corporate name, and that as it had no legal capacity to receive the title, the conveyance was absolutely void for want of a grantee capable of taking and holding the land.

So in the case of *Starkweather* v. *The American Bible Society*, 72 Ill. 50, where the father of the appellant had devised an undivided eighth of his estate, which consisted principally of realty, to the trustees of the Bible Society, the Supreme Court held, affirming the *East St. Louis Case*, *supra*, that the corporation was incapable of taking the title, and that, therefore, the devise failed, and the estate descended

[1] The rest of the opinion is omitted as not of general interest.—Ed. Am. L. Reg.

to the heirs free from any claim of the society, legal or equitable.

The Supreme Court of Wisconsin, in a case which aroused much interest (*The State ex rel.* v. *Peter Doyle, Secretary of State*, 40 Wisc. 220), took strong ground in upholding the absolute authority of the state legislature and state tribunals in establishing and enforcing terms and conditions upon foreign corporations, doing business within that state, the legislature having passed an act making it a condition precedent for a foreign insurance company, establishing an agency in that state, that it should stipulate not to remove to the federal court any writs which might be brought against it. The state Supreme Court held the act constitutional, in opposition to the ruling of the United States Circuit Court, and when the latter case went to the U. S. Supreme Court (94 U. S. Rep., 4 Otto 535), that tribunal, following *Paul* v. *Virginia*, 8 Wall. 168, reversed the decree of its circuit court, thus practically affirming the opinion of the state court, and declaring that the insurance company had no constitutional right to do business in that state, and had only the option to conform to the conditions prescribed by the state or retire from its limits.

The United States Supreme Court, in the *Bank of Augusta* v. *Earle*, 13 Peters 519, considered the question of the comity between states, and the rights accruing thereunder, and Chief Justice TANEY delivering the opinion of the court, said, "that whenever the interest or policy of any state required it to restrict the rule of comity, it has but to declare its will, and the legal presumption is at once at an end; that whenever a state sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made." This case was approved in *Runyan* v. *Lessee of Cosler*, 14 Peters 122, where it was held, that every power which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised, and that as the policy of the state of Pennsylvania was, that lands there held by corporations without license from the Commonwealth were subject to forfeiture by the Commonwealth, a foreign corporation acquiring title to lands therein, took them subject to the exercise of such power of forfeiture.

JOSIAH H. BISSELL.

Chicago.

Supreme Court of the United States.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY *v.* OLGA DE MALUTA FRALOFF.

It is competent for passenger carriers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable and not inconsistent with any statute or its duties to the public, to protect itself against liability as insurer for baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk.

As a condition precedent to any contract for the transportation of baggage, the carrier may require information from the passenger as to its value, and demand extra compensation for any excess beyond that which the passenger may reasonably demand to be transported as baggage under the contract to carry the person.

The carrier may be discharged from liability for the full value of the passenger's baggage, if the latter by any device or artifice, puts off inquiry as to such value,